

ONTARIO COURT OF JUSTICE

IN THE MATTER OF a Ruling under Section 85 (2) of the
Provincial Offences Act, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

The Regional Municipality of York
Respondent
Applicant by Counter Application

— AND —

Sheida Sahraeian
Applicant
Respondent by Counter Application

Before Justice Peter Tetley
Heard on September 16, 2010

Written Reasons for Ruling prohibiting the Applicant (Respondent by Counter Application) from advancing a second application to extend time to file an Appeal following dismissal of a previous Application released on May 12, 2011

Hans J. Saamen **for the prosecution**
Lawrence Liquornik (Amicus Curiae) **for the defendant Sheida Sahraeian**

Tetley J.:

The Issue

[1] This ruling involves s. 85 of the *Provincial Offences Act* (hereinafter P.O.A.) R.S.O. 1990, c.P.33, s 85 and consideration of the legal impact of the December 15, 2009 amendment to that provision enacted under the *Good Government Act* 2009, S.O. 2009, c.33. Sched. 4. s. 1 (50), on the entitlement of the applicant to bring more than one application for an extension of time to file an appeal in respect of conviction. The determination of this

matter features principles of statutory interpretation and the underlying philosophy of the Rules of the Ontario Court of Justice in appeal under s. 135 of the P.O.A.

[2] **As at the date of the noted amendment s. 85 of the P.O.A. was revised to read as follows:**

Extension of Time - 85. (1) Subject to this section, the court may extend any time fixed by this Act, by the regulations made under this Act or the rules of court for doing anything other than commencing or recommencing a proceeding, whether or not the time has expired. 2009, c. 33, Sched. 4, s. 1 (50).

Limit on number of applications - (2) No more than one application for an extension of the time for filing of an appeal may be made in respect of a conviction. 2009, c. 33, Sched. 4, s. 1 (50).

Exception for commencing parking proceeding - (3) A justice may extend the time for commencing a parking proceeding where the court is unable to obtain proof of ownership of the vehicle or to send a notice of impending conviction to the defendant within that time because of extraordinary circumstances, including labour disputes and disruptions of postal services, power services and technological facilities. 2009, c. 33, Sched. 4, s. 1 (50).

[3] By virtue of s. 85 (2) a single application for extension of time for filing of an appeal from conviction is authorized. The same express limitation does not apparently apply to an application for extension of time for the filing of an appeal from sentence alone.

[4] The previous version of s. 85 did not contain such a restriction. It read as follows:

Extension of time - 85. any time prescribed by the Act or the regulations made there under or by the rules of court for doing anything other than commencing or recommencing a proceeding may be extended by the court, whether or not the prescribed time has expired. R.S.O. 1990, c.P.33, S. 85.

[5] On behalf of the prosecution service of the Regional Municipality of York (“the Region”), Mr. Saamen asserts the expressed statutory limitation on the entitlement to seek an extension of time for filing of an appeal from conviction in s. 85 (2) effectively prevents a subsequent application(s) from being considered by the court in circumstances where a like application has previously been considered and dismissed. In the view of the Region this one extension application rule applies even in circumstances where an initiating time

extension application has been noted dismissed as abandoned without consideration of the merits of the application “*ab initio*”.

[6] Mr. Saamen defines the legal questions to be answered in this application as follows:

1. Can a defendant bring a subsequent application to extend time to file an appeal if an earlier application has been dismissed as abandoned?
2. In the event the answer to that question is “No”, can a motion be brought to re-open the initial order of dismissal of an abandoned extension application with a view to having the court consider the relative merits of the initial extension request.

Facts in Issue

[7] The applicant in this matter, Sheida Sahraeian, was originally charged with three offences under the *P.O.A.* including failing to have a motor vehicle insurance card contrary to s. 3 (1) of the *Compulsory Automobile Insurance Act* R.S.O. 1990. C.c25, as amended, speeding contrary to s. 128 of the *Highway Traffic Act (H.T.A.)* R.S.O. 1990. C.H-8, as amended and operating a motor vehicle without a currently validated permit s. 7(1) *H.T.A.*

[8] These charges were not defended and convictions were entered by virtue of default proceedings initiated in accordance with s. 9 of the *P.O.A.* on December 7, 2009.

[9] About three weeks later, on December 31, 2009, the applicant filed three applications to extend the time to file an appeal from the default convictions without first having paid the levied fines. These applications were returnable in the Provincial Offences Appeal Court before a judge of the Ontario Court of Justice on March 11, 2010.

[10] The applicant failed to attend court on March 11, 2010 and as a consequence the extension applications were noted dismissed as abandoned.

[11] Undeterred, the applicant served and filed three new extension applications the following day, March 12, 2010. These applications were made returnable on July 22, 2010. Again, on that date, the applicant failed to appear and the matters were adjourned to consider the legal effect of s. 85 (2).

[12] Lawrence Liquornik, Barrister and Solicitor, accepted the appointment as amicus curiae in order that legal submissions might be received in support of the relief the applicant had originally requested.

[13] On August 26, 2010, on advancement of argument by counsel, the second extension application was formally dismissed as being statute barred by virtue of the single extension application limitation particularized in s. 85 (2). At that time, I concluded the application was subject to the limitation in s. 85 (2) as that provision had been enacted prior to the filing of the initial extension application (December 31, 2009) although the convictions themselves were registered prior to that legislative change (December 7, 2009).

[14] As noted, by counter application, York Region's Prosecution Service also seeks direction, in view of the passing of s. 85 (2), as to whether a defendant can advance a subsequent request to revisit the relative merits of an abandoned and dismissed extension application in first instance for the purpose of having the merits of that originating request determined.

Positions of the Parties

A. The Regional Municipality of York

[15] According to the respondent one of the reasons s. 85 (2) was enacted was to curtail the continuing problem presented by the serial abandonment and subsequent reconstitution of applications for extensions of time to file an appeal from conviction.

[16] Note is made of the potential implications of s. 8 (1) of the Ontario Rules of Practice, Ontario Regulation 222/94, (the rules of the Ontario Court (Provincial Division) in appeals under s. 135 of the P.O.A.) which reads as follows:

8 (1) Judges power – A judge may extend or abridge the time for bringing an appeal and for any other act in connection with an appeal for which a time is prescribed before or after the expiration of the time prescribed.

(2) Notice. A notice of motion to extend or abridge time shall be given to the opposite party, unless otherwise directed by a judge.

Mr. Saamen nevertheless submits the permissible number of extension applications is now statutorily limited to one by virtue of s. 85 (2).

[17] The clearly expressed intention of the legislation is submitted as placing a limit on the wide discretionary procedural authority inherent in s. 8.

[18] The respondent also submits the appeal court's sanctioning of an application to restore an original extension application that has been previously dismissed as abandoned effectively renders meaningless the expressed intent of s. 85 (2). In support of this assertion reference is made to section 137 of the *P.O.A.* This provision reads as follows:

Dismissal on abandonment - 137. (1) Where an appeal has not been proceeded with or abandoned, the court may order that the appeal be dismissed. R.S.O. 1990, c. P.33, s. 137.

Dismissal by justice - (2) Where the clerk of the court considers that an appeal has not been proceeded with or has been abandoned, the clerk may, after giving notice to the parties to the appeal, have the matter brought before a justice sitting in open court to determine whether the appeal has been abandoned and the appeal should be dismissed. 2009, c. 33, Sched. 4, s. 1 (59).

Motion to restore - (3) A party to an appeal that was dismissed under subsection (2) may apply to have the appeal restored. 2009, c. 33, Sched. 4, s. 1 (59).

[19] As there is no similar provision in the *P.O.A.* authorizing restoration applications to be brought following dismissal of an extension application that “has not been proceeded with or has been abandoned” the respondent asserts the availability of such a process is implicitly excluded.

[20] This restrictive analysis is submitted as being consistent with the wording of s. 85 (2). If authorized, a motion to re-open, of a previously noted “dismissed as abandoned” extension application, would create a ready means of circumventing the “one application for an extension of time” directive in s. 85 (2). Such a procedure would effectively render s. 85 (2) meaningless from a practical perspective in the view of the Region.

[21] Finally, the Respondent asserts the purposeful application of certain referenced

principles of statutory interpretation favour the “one extension application” only approach. Reliance is placed on the inclusion of an expressed statutory entitlement implying the exclusion of that not specifically referenced. This submission is founded on the legal maxim “*expression unius est exclusion alterius*” (the expression or inclusion of one thing implies the exclusion of the other); the fact the legislature is presumed to act with meaningful and purposeful intent, with the resultant corollary that statutory enactments are to be interpreted in a manner that is consistent with that expressed purpose, intention, object and aim.

The Contrary Position

[22] In Mr. Liquornik’s oral submissions and the written brief filed by the respondent, the legal basis for a more expansive interpretation of the practical import s. 85 (2) was reviewed.

[23] The focus of this submission is the fact an in-correctable injustice might result in circumstances where an originating application to extend time for filing is noted as dismissed as abandoned for reasons beyond the applicant’s control such as mistake, administrative error, factual misapprehension or misunderstanding, illness, accident, incapacity or similar causes.

[24] Reference is made to the underlying philosophy of the P.O.A. as articulated by MacDougall J. in *Ontario (Ministry of Labour) v. Discovery Place Ltd.* [1996] O.J. No. 690 at paragraph 18;

“The overall philosophy of the Provincial Offences Act is to ensure that technical objections do not impede the arrival of a verdict on the merits. The Act provides broad curative provisions ensuring that the jurisdiction over the information is not lost because of any failure of a court to exercise its jurisdiction at any particular time.”

[25] Statutorily, Rule 1 (3) of O. Reg. 722/94 is noted as directing that the appeal rules be “construed liberally” in order to “obtain an expeditious conclusion of every proceeding as is consistent with a just determination of the proceeding”. Consistent with this principle Rule 8 (1) authorizes the presiding appeal court judge to “extend or abridge the time for

bringing an appeal and for doing **any other act** (emphasis added) in connection with an appeal for which time is prescribed before or after the expiration of the time prescribed”.

[26] Section 85 (1) of the P.O.A. is viewed as the statutory embodiment of this rule and permits the court (regardless of whether a mandated time period has expired or not) to extend any time fixed by the Act, the regulation made under the Act or the rules of the court for doing anything other than commencing or recommencing a proceeding.

[27] The referenced curative provisions are submitted as not being limited to matters of jurisdiction and are contended to exist in any circumstance where an application has been dismissed other than on the merits. In such circumstance, if the court concludes it is in the interests of justice that the order should be varied or set aside, the circumstances of the order, if dismissed, may be revisited.

[28] In the event an initial application for an extension of time to file an appeal is noted as dismissed as abandoned as a consequence of the involuntary, unavoidable or justifiable non-attendance of the moving party, or for some other compelling reason, s. 146 of the Courts of Justice Act, R.S.O. 1990, c. 43, (hereinafter CJA) and the common-law doctrine of fairness are asserted as offering two avenues authorizing the revisiting of an order of dismissal should circumstances warrant.

[29] Section 146 of the CJA reads as follows:

Where procedures not provided

146. Jurisdiction conferred on a court, a judge or a justice of the peace shall, in the absence of express provision for procedures for its exercise in any Act, regulation or rule, be exercised in any manner consistent with the due administration of justice. R.S.O. 1990, c. C.43, s. 146.

As the P.O.A. does not reference a procedure for either appealing or re-opening an unadjudicated application that has been dismissed as abandoned, s. 146 of the CJA is submitted as providing the requisite jurisdictional authority enabling the court to review such matters if the interests of justice require.

[30] Note is also made of the inherent jurisdiction of superior courts on review and of

the authority of courts of first instance to control their own process as circumstances may dictate. This situation was addressed by the Ontario Court of Appeal in *R. v. J.R.B.* [1993] O.J. No. 2630, a case that involved a review of the circumstances where the court had previously refused to rescind an order dismissing a criminal appeal as abandoned where the appellant failed to surrender himself into custody prior to the hearing of the appeal.

[31] At paragraph three of the *R. v. J.R.B.* endorsement the following appears:

“...This court has the power to rescind an order of the court dismissing an appeal as an abandoned appeal. That power is not exercised routinely, but will be invoked where the interests of justice so warrant. In most cases where the power is exercised, the applicant is able to demonstrate that the initial order was made in error, or that when the order was made the court was operating under some misapprehension of the material facts or without knowledge of all the material facts” and further...“The power to rescind an earlier order dismissing an appeal as abandoned should not become a means whereby one panel of this court sits on appeal from the merits of a decision made by another panel of this court.”

[32] Similar sentiments, albeit all within the context of matters involving courts of superior jurisdiction, are expressed in *R. v. Jacobs* [1970] S.C.J. No. 67, where the Supreme Court of Canada considered a situation where a scheduling or administrative oversight by counsel’s secretary occasioned dismissal of a criminal conviction appeal. In dismissing the Crown’s appeal from the Quebec Court of Appeal’s order restoring the matter to the appeal list the court noted, with approval, the exercise by the Court of Appeal: “... of the discretionary power relating to practice concerning the proper administration of justice in criminal matters,” and the absence of any prior consideration of the merits of the criminal appeal in the judgment of the lower courts.

[33] *R. v. Jacobs* is reviewed and adopted by the Ontario Court of Appeal in *R. v. Watson* 23 C.C.C. (2d) 366 where the appeal court considered a request to extend time to file an appeal by an appellant whose previous appeal had been noted dismissed as abandoned a year before. In concluding jurisdiction existed to revisit the previous order of dismissal the court notes:

“It is our view that, since the appeal was not disposed of on its merits, but

was simply dismissed as an abandoned appeal by the Court acting upon a notice of abandonment filed by the applicant, the court has the power to hear the application and to grant the relief requested, if is persuaded that it ought to be granted” and also,

“...We prefer to rely upon *R. v. Jacobs*, supra, which seems to be authority for this Court's power, in the circumstances, to grant the relief requested on this application, if we think that it ought to be granted on the facts.”

[34] The Court also noted jurisdiction may exist to authorize the re-opening of a matter which has previously been adjudicated on the merits should circumstances warrant. See *R. v. Bell*, [1947] O. W. N. 801.

[35] Finally, in *R. v. Wigmore*, [1997] B.C.J. No. 1505 the Court of Appeal of British Columbia considered a case where an appeal was noted dismissed for want of prosecution when the lawyer for the appellant arrived late. The summary conviction appeal court judge refused to re-open the matter believing wrongly, as it was later determined, that having earlier dismissed the matter he was rendered without jurisdiction to entertain a request to re-open. Reference was made to *R. v. Audy*, (No. 1) (1977) 34 C.C.C. (2d) 228 (Ont. C.A.); *R. v. Dunbrook*, (1978), 44 C.C.C. (2d) 264 (Ont. C.A.); *R. v. Blaker*, (1983) 6 C.C.C. (3d) 385 (B.C.C.A.), *R. v. Daryle William Haug*, B.C.C.A. CA018291, August 15, 1994 and, *R. v. Jansen*, (1996), 77 B.C.A.C. 236 (C.A.)

[36] Citing Craig J.A. in *Blaker*, the court confirmed that an appellant court has jurisdiction to vary or set aside an order disposing of an appeal in a criminal case, if that order was made for a reasons not involving consideration of the merits of the case, should the interests of justice require.

[37] These authorities are contended to support the proposition that a motion to restore an initial, un-adjudicated, extension application, that has been previously noted dismissed as abandoned, is available on review by a provincial court judge. The applicant resists the respondent's assertion that the absence of a specific “re-opening” procedure, akin to that previously noted to exist in the appeal process pursuant to s. 137, inexorably leads to the conclusion that such relief is not available. In view of the impact of s. 146 of the C.J.A. and the courts continuing obligation to ensure due process and the best interests of justice are

preserved, the applicant submits the court continues to retain the jurisdiction to re-open an earlier order dismissing an application for extension of time and, if warranted, to revisit the request by considering the facts in issue and the relative merits of the relief sought. To do otherwise is submitted as being contrary to principles of fairness and at odds with the purpose and intent of the P.O.A. That purpose, as noted earlier, is to ensure that procedural technicalities do not act to prevent, impair, or delay the securing of a ruling or verdict based on consideration of the merits of the matter in issue. (See MacDougall J. at para. 18, *Ontario (Ministry of Labour) v. Discovery Place Ltd.*, supra and *R. v. Khan* [2005] O.J. No. 2679, B.W. Duncan J. at para's 5 and 6.).

Summary

[38] On consideration of counsel's submissions, the facts in issue in this application, the relevant statutory authorities and cases cited, the following conclusions may be drawn:

- (i) Effective December 15, 2009, Section 85 (2) of the P.O.A. expressly prohibits more than one application for an extension of time for filing of appeal made in respect of a conviction;
- (ii) In circumstances, such as those presented here, where a second application to extend the time for the filing of appeal was instituted following the dismissal of the first such application as abandoned and the second application post dates the enactment of s. 85 (2) of the P.O.A. (occurs after December 15, 2009) the subsequent application(s) is statute barred;
- (iii) While this appeal did not involve consideration of a request to re-open an un-adjudicated extension request of first instance that had been noted as dismissed as abandoned, I conclude, should those circumstances arise, the P.O.A. appeal court judge has jurisdiction to consider such an application even in the absence of specific statutory authority or inherent jurisdiction. The reviewed authorities support the applicants position on this issue and not the more restrictive or definitive approach asserted by the respondent. The case law cited confirms equitable concepts of fairness, the preservation of due process and a preference that cases be decided on their merits, if at all possible, are factors that support a more accommodating approach to this issue than that proposed by the respondent, provided certain factual pre-conditions are met;
- (iv) As indicated by the Ontario Court of Appeal in *R. v. J. R. B.*, supra in order for an originating (first) application for extension, that has been noted dismissed as abandoned, to be subsequently re-considered, the applicant must demonstrate that the initial order was made as a result of an "error" or that the court "was operating under some misapprehension of the

material facts or without knowledge of all of the material facts” when the order was made. If these threshold considerations cannot be met the matter shall not be re-opened;

(v) Once re-opened (assuming the noted preliminary threshold criteria has been determined to exist) the originating application can then be considered afresh and adjudicated on the merits.

Conclusion

[39] Accordingly, the questions referenced in this matter are concluded to be answered as follows:

- 1) Question – Can a defendant bring a subsequent application to extend time to file an appeal if an earlier application has been dismissed as abandoned?

Answer – **No.** s. 85 (2) bars such an application being brought post December 15, 2009.

- 2) Question – Can a motion be brought to re-open the initial order of dismissal of an abandoned extension application with a view to having the court consider the relative merits of the initial extension request?

Answer – **Yes**, provided:

(a) the threshold criteria is met justifying the re-opening (i.e. a compelling fact based explanation for the “abandonment” of the application in first instance) and,

(b) the relative merits of the extension application have not previously been adjudicated.

Other Issues

[40] In the commentary relating to this provision in the *2010 Annotated Ontario Provincial Offences Act* authors Libman J. and Ontario Deputy Attorney General Murray Segal review several other potential implications of this relatively new section. Note is made of the fact s. 85 (2) applies only to appeals from conviction and does not specifically reference appeals from sentence alone. This may leave the potential for repeated applications, in accordance with the pre-amendment practice, to extend time to file in sentence appeals, while an application to extend time to file a conviction appeal would be limited to a singular application by virtue of the express wording of s. 85 (2).

[41] Consideration is also given to a foreseeable circumstance where an initial time

extension application has been considered and permitted subject to the perfecting of the appeal proper within a fixed time frame. In such a situation, in the event the appeal is not perfected within the time permitted, the author's query is whether another extension application might be permitted or an original application revisited.

[42] Reference is also made to the issue of retrospectivity and the effective date of implementation. If a conviction was registered prior to the December 15, 2009, with leave being sought initially to extend the time for filing an appeal from that conviction prior to December 15, 2009, does s. 85 (2) apply or is the application(s) governed by the pre-amendment provision?

[43] Finally, are there circumstances where a further review by the court, of an order dismissing an application for extension of time that has been considered on the merits, which may be permissible? *R. v. J.R.B.* suggests that, in some cases, if the interests of justice warrant in circumstances in which the court may have initially been operating under a misapprehension of certain material facts or without knowledge of all material fact courts, at least courts of superior jurisdiction, have the power to rescind an order dismissing an appeal as an abandoned appeal. Presumably the same considerations would apply to a dismissed application to extend time to file an appeal if the same circumstances characterized the courts determination of the appellant's initial extension application.

[44] As, in large measure, these matters were not advanced for determination in this ruling they may need to be clarified at some further future date on direction from the court. They are noted here simply to indicate there are other potential implications of s. 85 (2) of the P.O.A. beyond the two main issues adjudicated here.